

reported to the respondent and claimant did not seek medical treatment for two to three (2-3) weeks after the incident. Claimant also missed no work subsequent to this initial injury and fully performed his job subsequent to the mowing incident.

Claimant alleges a second injury on October 11, 1994, while moving cylinders at work.

Respondent provided information to indicate claimant missed work on October 3, 1994, and upon returning to work advised his employer he awoke with severe back pain. The employees of the respondent who observed claimant on October 4, 1994, noticed claimant was moving with difficulty and showing symptoms of back pain. When the employees inquired of the claimant, he advised he had hurt his back while moving furniture. Debra Smith, personnel manager for the respondent, assisted claimant in preparing an attendance report for October 3, 1994, indicating claimant had hurt his back the weekend before, while moving furniture.

Terry Bentley, the claimant's supervisor, was never advised by claimant that he had injured himself while mowing the lawn. He did testify that claimant called in sick on October 3, 1994, advising that he had hurt his back and was unable to work. When claimant appeared for work on October 4, 1994, he advised Mr. Bentley that he had injured his back while moving furniture over the weekend. Mr. Bentley observed that claimant appeared to be in pain on October 4, 1994.

Kimberly Brakey, the claimant's live-in girl friend, was asked if claimant had moved furniture the weekend before October 3. She advised he had. She was also asked at the Preliminary Hearing whether she observed an accident suffered by claimant while moving furniture and answered, "yes." She did testify that there was no heavy lifting required but the testimony of Ms. Brakey regarding claimant's injury while moving furniture is uncontradicted.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions upon which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Whether an accidental injury arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or more credible and to adjust the testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The evidence in the record substantially contradicts claimant's allegations regarding his alleged work-related injury. The more compelling evidence appears to come from the testimony of respondent's employees and from the uncontradicted testimony of claimant's girlfriend, Kimberly Brakey. This evidence supports a finding that claimant suffered an accidental injury while moving furniture in a nonwork-related circumstance.

The Appeals Board finds that claimant's allegations of an accidental injury arising out of and in the course of his employment with respondent are not supported by a preponderance of the credible evidence and claimant's request for benefits must be denied. The Appeals Board further finds no error in the Administrative Law Judge's ruling regarding claimant's offer of rebuttal evidence.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl dated December 15, 1994, is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Wichita, KS
Kirby A. Vernon, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director